No. 652

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NOV 3 1944
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Supreme Court of the United States

October Term—1944

STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,

Petitioner,

—*vs.*—

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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ARGUMENT

POINT I.

Petitioner, a trustee in bankruptcy is entitled to examine the Respondent pursuant to Sec. 21-A of the Bankruptcy Act, 11 U. S. C. A. Sec. 44-A and the order of the Circuit Court of Appeals affirming the order of the District Court which vacated the ex-parte order allowing the examination of the Respondent is inconsistent with and contrary to the intents and purposes of the Statute 9-16

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Supreme Court of the United States

October Term—1944

STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,

Petitioner,

—*vs.*—

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,

Respondent.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, STERLING CARR, prays that a writ of certiorari issue to review an order of the United States Circuit Court of Appeals for the Second Circuit, dated Aug. 10th, 1944, affirming an order of the United States District Court for the Southern District of New York, granting an order of the Respondent vacating and setting aside an ex parte order for the examination of the Respondent under Section 21-a of the Bankruptcy Act, 11 U. S. C. A., Section 44-a, so far as it applies to the Respondent and quashing a subpoena issued to the Respondent.

Summary Statement of the Matter Involved.

Petitioner, a Trustee in Bankruptcy, duly appointed in the United States District Court for the Northern District of California, Southern Division, obtained an order dated

July 13th, 1943, in the United States District Court, Southern District of New York for an ancillary examination of witnesses within the jurisdiction of this Court, such witnesses being the Respondent, Superintendent of Banks of the State of New York, by a duly authorized representative and the Guaranty Trust Company of New York (fol. 4).

The petition upon which the said order was obtained sets forth among other things, that the Respondent, as Superintendent of Banks of the State of New York, had pursuant to law taken into his possession the assets of the Yokohama Specie Bank, Ltd., and was liquidating the same; that the said Yokohama Specie Bank, Ltd., was at the time of the taking of possession by the Respondent indebted to Nippon Yusen Kaisya, the Bankrupt herein, in the sum of approximately $142,000; that the Trustee had filed two claims with the Respondent for moneys due to the Bankrupt from the said Yokohama Specie Bank, Ltd., and which claims had been rejected by him under the authority granted him under the Banking Laws of the State of New York, and that the Petitioner was about to commence suit against the Superintendent of Banks to sustain the claims filed by him (fol. 16).

The petitioner also stated that he was desirous of examining the Respondent with respect to the acts, conduct and property of the Bankrupt herein with particular regard to its transactions had with the Yokohama Specie Bank, Ltd., pursuant to Sec. 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a (fol. 16).

The Respondent thereafter moved to vacate that part of the order of the District Court dated July 13th, 1943, which authorized the examination of the Respondent and to quash the subpoena *duces tecum* issued out of the District Court requiring the Respondent to produce certain records in his possession appertaining to or relating to the transactions by the Bankrupt and the Yokohama Specie Bank for the period from January 1st, 1941 to December 8th, 1941 (fol. 34).

The basis of his objection to the order allowing his examination was that the said order was based on allegations which are "wholly fictitious and false as a matter of law" and that there was no reasonable cause shown for the proposed examination (fol. 53).

In his petition the alleged falsity is based on the claim of the Respondent that a certain deposit made by the Bankrupt in the Yokohama Specie Bank on July 17th, 1941, in the sum of $150,000. could not constitute an illegal deposit as claimed by the petitioner in his supporting petition since it is claimed that the alleged illegality of the deposit was stated to consist of a violation of a proclamation of the President of the United States prohibiting transactions with nationals of Japan, and which proclamation was not signed and published until July 26th, 1941, nine days after the alleged deposit and consequently the allegation of illegality was without basis "as a matter of law upon judicial notice" (fols. 47-48). The Respondent further claimed in his petition that the Yokohama Specie Bank was not authorized to receive deposits but only authorized to receive money for transmittal and that the records of the Yokohama Specie Bank in his possession did not disclose any deposit accounts of the Bankrupt or anyone else (fol. 50).

The Respondent's motion was granted and the order dated February 15th, 1944, was made by the District Court (fol. 85). An appeal was taken by Petitioner from said order to the United States Circuit Court of Appeals for the Second Circuit (fol. 91). On July 7th, 1944, the Circuit Court of Appeals for the Second Circuit (Chase, Clark and A. Hand, *J.J.*) handed down its opinion affirming the order of the District Court (Record 36-38). A petition for rehearing to the said Circuit Court of Appeals was timely filed and said petition for rehearing was denied on July 28th, 1944. The order confirming the order of the District Court was entered on August 10th, 1944 which is the order appealed from (R. 50).

Statute Involved.

The statute involved is Sec. 21-a of the Bankruptcy Act, as amended 11 U. S. C. A., Sec. 44-a.

Questions Presented.

1. Did the Circuit Court of Appeals err in holding that the District Court did not abuse its discretion by denying the petitioner, a trustee in bankruptcy, the right of examination pursuant to Section 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44, of the Respondent a Superintendent of Banks of the State of New York as to transactions between the Bankrupt and the Yokohama Specie Bank, a banking institution taken over for the purpose of liquidation by the said Superintendent of Banks and who had in his possession books and records of the Yokohama Specie Bank which would disclose transactions between said bank and the bankrupt, sought to be examined into by the petitioner?

2. Did the Circuit Court of Appeals err in holding that since the said Superintendent of Banks having disclosed all there was to a business transaction between the Bankrupt and the said Yokohama Specie Bank, sought to be examined into by the Petitioner, presumably with no bias to conceal or to distort the facts, that it was not an abuse of discretion to deny the right of examination pursuant to Section 21-a, 11 U. S. C. A., Sec. 44 to petitioner, particularly after the petitioner has made a showing that the transactions sought to be examined into by the petitioner concerned the acts, conduct or property of the Bankrupt and were suspicious and had evidences of fraud?

3. Did the Circuit Court of Appeals err in affirming the order of the District Court vacating and setting aside the ex parte order for the examination of the Respondent Superintendent of Banks as applicable to him?

Reasons for Granting the Writ.

1 . The decision of the Circuit Court of Appeals for the Second Circuit is probably in conflict with the following applicable decision of this Court.

Cameron v. *United States*, 231 U. S. 710.

2. The decision of the Circuit Court of Appeals is in conflict with the following decisions of other Circuit Courts of Appeal, is in conflict with the following decisions of other Circuit Courts of Appeal on the same matter.

Matter of Eastern Utilities Investing Corporation (C. C. A. 3rd), 98 Fed. 2nd 620;
Travis v. *United States* (C. C. A. 10th), 123 Fed. 2nd 268;
Ulner v. *United States* (C. C. A. 6th), 219 Fed. 641, Cert. Den. 238 U. S. 638.

3. The decision of said Circuit Court of Appeals in refusing to grant petitioner the right to examine the Superintendent of Banks of the State of New York, pursuant to Section 21-a, 11 U. S. C. A., Sec. 44, so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and your petitioner have

such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated, October 31, 1944.

STERLING CARR,
Petitioner.

By DAVID HAAR,
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SAM H. LIPSON,
Of Counsel.

Supreme Court of the United States

October Term—1944

STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,

Petitioner,

—*vs.*—

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Court Below.

The District Court for the Southern District of New York did not render an opinion but made an order vacating the ex parte order of examination of the District Court and which order is printed fully in the Record (Fol. 89).

The opinion of the Circuit Court of Appeals has been officially reported in 144 Fed. 2nd 47, and is printed in full in the Record (R. ~~25~~ 26).

Jurisdiction of This Court.

The decision of the Circuit Court of Appeals was filed July 7th, 1944 (R. 36). A petition for rehearing of the decision was denied on July 28th, 1944 (R. 40). The order of the Circuit Court of Appeals confirming the order of the District Court was entered on August 10th, 1944 (R. 48).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A., Section 347(a).

Statement of the Case.

The statement of the case already given in the petition under the heading "Summary Statement of the Matter Involved" is hereby adopted and made part of this brief.

Specifications of Errors.

Petitioner maintains that the Circuit Court of Appeals erred:

1. In holding that the District Court did not abuse its discretion in vacating the original ex parte order which granted Petitioner the right of examination of the Respondent pursuant to Section 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a as to transactions between the Bankrupt and the banking institution taken over by the Respondent for the purpose of liquidation.

2. That the order of the Circuit Court of Appeals in confirming the order of the District Court which vacated the ex parte order granting the Petitioner the right of examination of the Respondent restricts and limits the purposes of Sec. 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a governing the examination of witnesses.

Summary of Argument.

1. Petitioner, a Trustee in Bankruptcy is entitled to examine the Respondent pursuant to Sec. 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a and the order of the Circuit Court of Appeals affirming the order of the District

Court which vacated the ex parte order allowing the examination of the Respondent is inconsistent with and contrary to the intents and purposes of the Statute.

2. The Circuit Court of Appeals has erred in ruling that the order of the District Court which vacated the ex parte order allowing the examination of the Respondent pursuant to Sec. 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a was not an abuse of discretion since the right of examination could only be set aside where a clear abuse of discretion appears.

ARGUMENT

POINT I.

Petitioner, a trustee in bankruptcy is entitled to examine the Respondent pursuant to Sec. 21-A of the Bankruptcy Act, 11 U. S. C. A. Sec. 44-A and the order of the Circuit Court of Appeals affirming the order of the District Court which vacated the ex-parte order allowing the examination of the Respondent is inconsistent with and contrary to the intents and purposes of the Statute.

The Petitioner is seeking the examination of Respondent with regard to transactions had between the Bankrupt and the Yokohama Specie Bank, which bank is in the process of liquidation by the Respondent. The Respondent has in his possession books and records of the Yokohama Specie Bank which would disclose the nature and extent of the Bank's transaction with the Bankrupt. The examination is sought to obtain information for the recovery of assets belonging to the Bankrupt estate in pending litigation between Petitioner and the Respondent and which information Petitioner seeks to establish a claim of $142,000 against the Respondent

as Superintendent of Banks of the State of New York (fols. 15-16).

Amongst other things, Petitioner seeks to examine into a particular transaction involving a deposit made by the Bankrupt on July 17th, 1941, in the sum of $150,000 in the Yokohama Specie Bank.

The Petitioner originally obtained an ex parte order from the District Court (fol. 4) calling for the examination of the Respondent based on his petition wherein he stated amongst other things, that as a result of the rejection of two claims filed with the Respondent in the sum of $142,000, he was about to institute a suit against the Respondent to establish his claim (fols. 10-21).

It was further stated in the petition that Petitioner was desirous of examining the Respondent with respect to the acts, conduct and property of the Bankrupt with particular regard to its transactions had with the Yokohama Specie Bank since the examination sought was necessary in order to establish the claims in view of the fact that the Respondent had in its possession books and records and other data referring to the transaction between the Bankrupt and the Yokohama Specie Bank (fols. 16 and 17).

The petitioner submitted an affidavit which was read in opposition to the Respondent's motion to vacate the ex parte order of the District Court, in which affidavit it was stated that the Petitioner had in his possession written exhibits outlining a scheme between the Yokohama Specie Bank and the Bankrupt so as to make it appear that moneys deposited by the Bankrupt in the Bank was transmitted to Japan although actually the moneys remained with the Bank in this country and was always available to the Bankrupt (fols. 72-78). He also stated that he had in his possession records which would tend to corroborate his claim that the Respondent had funds belonging to the Bankrupt (fol. 78).

The Respondent's application to vacate was based on statements wherein he denied that he or the Yokohama

Specie Bank had funds belonging to the Bankrupt and further claimed that the moneys received by the Bank had been received for transmittal to Japan and had been transmitted by cable on the same day received (fol. 51). He further stated that the Yokohama Specie Bank was not authorized to receive deposits but was only authorized to receive moneys for transmittal and that the records of the Bank in his possession did not disclose any deposit accounts of the Bank or anyone else (fol. 50).

He also urged that the allegations of Petitioner upon which the original ex parte order of examination was granted were fictitious and false as a matter of law, and that there was no reasonable cause shown for the proposed examination (fol. 53), and that the examination would cause expense and disruption of his staff which was not justified (fols. 55, 56).

The fundamental objection to the examination herein sought was that the petitioner has failed to show special cause for the examination, particularly in view of the Respondent's denial that the transaction sought to be examined into was as claimed by Petitioner in view of his version of the transaction.

Section 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a provides that "The Court may upon application of any officer, bankrupt, or creditor, by order require any designated persons * * * to appear before the Court * * * to be examined concerning the acts, conduct, or property of the Bankrupt."

The purposes of this Section have been expressed by this Court and various Circuit Courts of Appeal including the Court below on various occasions.

This Court in referring to the Section in *Cameron v. United States,* 231 U. S. 710 has stated:

> "The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the Court to discover the extent and where-

abouts and to come into possession of it that the rights of creditors may be preserved."

In *Matter of Eastern Utilities Investing Corporation,* C. C. A. (3rd) 98 F. (2nd) that Court stated:

"The purposes of Section 21-A has been universally recognized as that of discovery. The object of such proceeding is to afford creditors and officers charged with the administration of an estate full information in connection therewith in order that the necessary steps may be taken for its preservation."

Likewise, in the *Matter of Samuels and Lesser,* C. C. A. (2nd) Circuit, 215 Fed. 845, the Court below said concerning Section 21-a:

"That section is intended to provide a searching and summary method for the discovery of hidden assets not only by the examination of the bankrupt, but of other witnesses. The proceeding it authorizes is meant to assist the trustee in discovering and collecting the assets. The section confers authority upon the trustee or any creditor of the estate to apply for the examination of any person. The person to be examined cannot object to being sworn and examined on the ground that no issue has been made up for determination, neither can he object that there is no fact in dispute. The simple object is to obtain information as to the bankrupt's property."

See also:

Youroveta Home & Foreign Trade Company (C. C. A. 2nd), 288 Fed. 507;
Travis v. *U. S.* (C. C. A. 10th), 123 Fed. 2nd, 268;
Ulmer v. *United States* (C. C. A. 6th), 219 Fed. 641, cert. denied 238 U. S. 638;

In Re: *Paramount Publix Corporation* (C. C. A. 2nd), 82 Fed. 2nd 230.

Despite the pronounced purposes of the Statute as expressed by this Court and equally recognized by the Court below, Petitioner by the ruling of the Court below has been denied the opportunity of examining the Respondent although recognizing that Petitioner, a Trustee in Bankruptcy is entitled to have "reasonable judicial assistance in his task of locating the Bankrupt's assets" (Record 38).

It is respectfully submitted that sufficient has been shown by Petitioner both in the original petition upon which the ex parte order of examination was granted and in the reply affidavit to have warranted the examination.

It is obvious that petitioner seeks to examine the Respondent as to transactions relating to the acts, conduct and property of the Bankrupt and as for the purpose of discovering assets belonging to the Bankrupt estate. The Respondent cannot object to his examination merely because he has explained the transaction under inquiry and has disputed Petitioner's version of the nature of the transaction and has further denied possession of moneys belonging to the bankrupt estate. In the *Matter of Samuels and Lesser, supra*, the Court below has held that "the person to be examined cannot object to being sworn and examined on the grounds that no issue has been made up for determination, neither can he object that there is no fact in dispute." In the case at bar the facts and the nature of the transaction sought to be examined into are in dispute and certainly in light of the declared purposes of the Act as expressed by this Court and recognized by the Court below, the ruling of the Court below in denying the examination of the Respondent is contrary to the intent and purposes of the Statute. The Court below has even denied Petitioner the opportunity of examining the Respondent as to the bases of the Respon-

dent's statements regarding the transaction as explained by him.

The right of examination under the Statute is without limitation or restriction so long as it is in aid of administration and concerns the acts, conduct or property of the Bankrupt. The Petitioner is seeking information in the possession of the Respondent which is reasonably pertinent to the subject of inquiry and relate to the transactions and conduct of the Bankrupt and the whereabouts of its property. The inquiry will aid the creditors in properly understanding the affairs of the Bankrupt. Obviously the inquiry is in the nature of a fishing examination and is to obtain facts to support the pending litigation between petitioner and the Respondent. While the scope of the examination may, of course, be limited or restricted to facts pertinent to the inquiry, the examination itself should not have been denied since Petitioner has made it clear that he is only concerned with the acts, conduct and property of the Bankrupt which is within the purview of the Statute.

In *Travis* v. *United States, supra,* the Court in referring to the Statute has stated:

> "In order to attain these ends a reasonably wide latitude of inquiry should be allowed in examination of persons closely associated with the bankrupt in business or otherwise."

In *Ulmer* v. *United States* (C. C. A. 6th), 219 Fed. 641, the Court stated:

> "Any fact or circumstance is relevant and material which fairly tends to establish something which may become important in the administration of the estate. The existence of property rights or interests not scheduled or rights to defend against apparent claims, or rights of

creditors to reclaim property in the hands of the bankrupt, or rights of a bankrupt to discharge—all these are instances of matters properly subject to such investigation on such a proceeding."

The Court below although recognizing that a bankruptcy trustee is entitled to judicial assistance in locating bankruptcy assets (Record 38) has denied the application on the ground that Respondent as Superintendent of Banks is unbiased and has apparently disclosed all there was to the transaction which Petitioner has sought to examine (Record 38).

The fact that the Respondent is a responsible public official and is unbiased does not prohibit his examination. The Statute provides that the Court may upon due application order any *designated person* to appear before the Court to be examined concerning the acts, conduct or property of the Bankrupt and there is no prohibition in the Act against examining a public official so long as the inquiry is pertinent and it concerns the acts, conduct or property of the Bankrupt. The Court below has held in *Marx* v. *Chase National Bank,* 2nd Circuit, 117 Fed. 2nd, 800, that the Trustee was entitled to examine anyone who had dealings with the Bankrupt "because from the beginning it has been recognized that the Trustee may inquire at large and at length except in cases of plain abuse, to be determined in the Court's discretion." The Court below in referring to the Statute, has also held "the power to require any person to attend is given generously and we cannot write into the Act exceptions or limitations which it does not contain. It is enough for our present purposes to say that the words 'any person' mean what they say * * *" *Youroveta Home & Foreign Trade Co., supra.*

The ruling of the Court below is inconsistent and would pervert the purposes of the Statute as expressed by this Court and equally recognized by it, and has so far departed

from the accepted and usual course of judicial proceedings relating to examinations under the Statute as to call for an exercise of this Court's power of supervision.

POINT II.

The Circuit Court erred in deciding that the order of the District Court denying the examination of the Respondent was not an abuse of discretion since the order granting the examination could only be set aside where a clear abuse of discretion appears.

It is respectfully submitted that Petitioner in seeking the examination of the Respondent has shown sufficient facts to warrant the examination. And as we have pointed out, the fact that Petitioner's version of the transaction sought to be examined into differs from that of the Respondent and is disputed would not justify the denial of the right of examination. Since the inquiry is directed towards ascertaining information regarding the acts, conduct and property of the Bankrupt and a reasonable basis for such examination had been shown to the District Court, it was an abuse of discretion to deny the right of examination and the Circuit Court erred in affirming the order of the District Court vacating the ex parte order of examination.

The Circuit Court aptly stated the rule as follows:

> "It is quite true that an order requiring examination under Section A is discretionery * * *
> * * * But discretion, if abused, is error of law, and therefore reviewable by petition to revise, and it is an abuse of discretion to refuse to follow settled law; i.e. (inter alia), approved decisions, even when exercising discretion."

In Re A. & W. Nesbit, Ltd., 2nd Cir. 282 Fed. 265.

The ex parte order of the District Court could only be set aside where a clear abuse of discretion appears.

Matter of Eastern Utilities Investing Corporation, C. C. A. (3rd) 98 F. (2nd) 620;
Cameron v. *United States,* 231 U. S. 710;
North Ward Radio Co. v. *Grigsby Grunow Co.* (C. C. A. 3rd Cir.) 308, 67 F. (2d) 745;
Yellow Motor Co. v. *David* (C. C. A. 8th Cir.), 465, 27 F. (2d) 597;
National Fire Insurance Co. v. *Thompson,* 281 U. S. 331, 50 S. Ct. 288, 74 L. Ed. 881;
United States v. *Corrick,* 298 U. S. 435, 56 S. Ct. 829, 80 L. Ed. 1263.

The decision of the Circuit Court of Appeals that the District Court did not abuse the discretion vested in it to determine whether or not special cause for the examination was sufficiently shown is clearly untenable and in conflict with the overwhelming weight of authority.

CONCLUSION.

It is therefore respectfully submitted that the errors in law of the Court below, and the equities and justice of this case call for the exercise by this Court of its supervisory powers, and to that end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
NOV 27 1944
CHARLES ELMORE CROPLEY
CLERK

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STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,

Petitioner,

against

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,

Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM—1944

No. 652

STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,
Petitioner,

against

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,
Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

Facts.

Upon the *ex parte* application of the trustee, based on his petition verified July 2, 1943 (R. 4), an order was granted by the District Court on July 13, 1943 (R. 2) for the ancillary examination of the Superintendent of Banks of the State of New York under section 21a of the Bankruptcy Act. Said petition stated that the trustee had been authorized "to commence proceedings to recover certain sums of money illegally deposited in The Yokohama Specie Bank, Ltd. at its office in New York City, during the year 1941, and to recover interest on certain bonds in the possession of your petitioner formerly belonging to the Bankrupt herein" (R. 4); that the Superintendent of Banks of the State of New York took possession of the

business and property in New York of The Yokohama Specie Bank, Ltd. on December 8, 1941, and is liquidating the same pursuant to the Banking Law of the State of New York (R. 5); that said Yokohama Specie Bank, Ltd. was at the time of the Superintendent's taking possession indebted to the Bankrupt in the sum of approximately $142,000 (R. 5); that the trustee had filed two proofs of claim with the said Superintendent for the moneys claimed to be due to the Bankrupt and that the Superintendent had rejected said claims (R. 5); that the trustee was about to institute suit against the Superintendent to sustain the said claims (R. 5); that the trustee deemed it necessary to examine the Superintendent and the books and records in his possession in order to establish the said claims (R. 6); and that the trustee in order to establish said claims also desired to examine the Guaranty Trust Company of New York with reference to a "deposit" of $150,000 by the Bankrupt with The Yokohama Specie Bank, Ltd. on July 17, 1941 and thereafter deposited by The Yokohama Specie Bank, Ltd. with Guaranty Trust Company (R. 6, 7).

Thereafter on July 13, 1943, the trustee commenced an action in the United States District Court, Southern District of New York, against the New York Agency and the Superintendent as liquidator (R. 16) to recover on the two said claims, one for $140,000, being the alleged balance of the alleged deposit on July 17, 1941, and one for $1,855.00, being the amount of interest claimed to be owing by the New York Agency as fiscal agent for certain obligors on bonds of the bankrupt held by the trustee (R. 19). In the complaint the illegality of the alleged "deposit" of $150,000 with the said New York Agency was stated to consist of a violation of a proclamation of

the President of the United States expressly prohibiting all transactions in foreign exchange or transfer or dealing with any property by any person in the United States with a National of the Empire of Japan (R. 16). On January 4, 1944 the action was dismissed for lack of jurisdiction on motion of the Superintendent (R. 16).

The Superintendent of Banks thereafter moved by petition (R. 12-20) and notice of motion served on the trustee's attorneys (R. 10, 11) for an order vacating the order for examination and quashing the subpoena issued pursuant thereto, upon the ground that the allegations in the petition of the trustee purporting to establish reasonable cause for said examination are wholly fictitious and false as matter of law.

The Superintendent invoked judicial notice that Executive Order 8832, the first so-called "Freezing Order" affecting Japan, was signed and published by the President on July 26, 1941, nine days after the "deposit" on July 17, 1941, alleged to have been made in violation thereof (R. 16, 17). The Superintendent also showed that the New York Agency of The Yokohama Specie Bank, Ltd. was not a bank of deposit and that no deposit account with the bankrupt or with any other person appeared in the books or records of the Agency (R. 17).

The trustee submitted an affidavit in opposition which purported to outline an alleged scheme between the bankrupt and the Yokohama Specie Bank, Ltd. "so as to make it appear that the Bankrupt's funds were transferred to Japan while actually the moneys deposited by the Bankrupt in the Yokohama Specie Bank, Ltd. were always available to the Bankrupt and were never transferred to Japan" (R. 24). The details of this affidavit are discussed in Point III.

After full argument in open court, the Superintendent's motion was granted, the order for his examination vacated and the subpoena quashed (R. 29, 30). On appeal, the Circuit Court of Appeals affirmed the order of the District Court (R. 36-38, 48). The present application for a writ of certiorari ensued.

Summary of Argument.

The respondent contends that the order appealed from was discretionary; that when it was made to appear to the Court that the special reasons assigned for the necessity of the examination in the trustee's petition were false as matter of law and upon judicial notice, the Court, in the exercise of a sound discretion, properly vacated the *ex parte* order and denied the examination; that no actual special cause for the examination of the Superintendent having been shown, either by the trustee's petition or by the affidavit submitted on his behalf (R. 21-28), the refusal of an order for examination was not an abuse of discretion requiring correction by the Circuit Court of Appeals or by this Court.

To make the respondent's position clear we deem it appropriate to refer to certain contentions which the Superintendent does not urge and has not advanced, but which seem to be suggested by the cases cited in petitioner's brief. That an action was to be brought; or that the examination was sought to obtain information in support of such contemplated action; or that such action was pending; or that it had been dismissed; or that the Superintendent claimed there was no merit to such action; or that he denied the facts alleged in the petition of the trustee on which the order for examination was granted, is not urged as reason for denying the trustee the examination. Respondent con-

cedes that none of such matters will, as a matter of law, defeat the right of examination under Section 21a, and has never argued to the contrary.

The respondent's argument here, as below, is that the petition of the trustee and the opposing affidavit, when tested in the light of judicial notice, and independently of any allegations or denials of fact by the Superintendent, not only fail to meet the requirement that some cause should be shown for the examination of a third party, but, on the contrary, show affirmatively that the examination could not tend to serve the purposes of Section 21a.

POINT I.

The decision of the Circuit Court of Appeals is not in conflict with any decision of this Court or of any Circuit Court of Appeals.

Petitioner suggests (p. 5) as a reason for granting the writ that the decision of the Circuit Court of Appeals "is probably in conflict" with the decision of this Court in *Cameron* v. *U. S.*, 231 U. S. 710, and "is in conflict" with decisions in the third, sixth and tenth Circuits rendered in *Matter of Eastern Utilities Investing Corporation* (C. C. A. 3rd), 98 Fed. 2nd 620; *Travis* v. *United States* (C. C. A. 10th), 123 Fed. 2nd 268; *Ulner* v. *United States* (C. C. A. 6th), 219 Fed. 641, Cert. Den. 238 U. S. 638 (Pet., p. 5).

None of these cases is in point. In *Cameron* v. *U. S.*, *supra*, the sole bankruptcy question involved was whether an examination in 21-a could be ordered before adjudication and the Court answered in the affirmative.

In *Matter of Eastern Utilities Investing Corporation*, *supra*, an order for examination had been granted by the District Court after full argument. The Circuit Court of

Appeals held that the granting of the examination was not an abuse of discretion and affirmed. There is nothing in the opinion to indicate that if the District Court had refused to allow the examination, the Circuit Court would have reversed.

In *Travis* v. *United States, supra,* the plaintiff in error was convicted of perjury for testifying falsely in a 21a examination in her husband's bankruptcy proceedings. The Circuit Court of Appeals held that the bankruptcy court had jurisdiction to order the examination and that her testimony was material. No question of discretion was involved or discussed.

In *Ulmer* v. *United States, supra,* the plaintiff in error had been convicted of perjury for testifying falsely in a 21a examination. "The right and power of the referee to make the order were not challenged, but Ulmer appeared and submitted to the examination" (at p. 644).

Petitioner fails to cite any decision by this or any other Court holding that the grant or refusal of an order of examination under Bankruptcy Act, Section 21a, is not discretionary; or which conflicts with the rule, announced in *In re Abbey Press* (C. C. A. 2nd) 134 Fed. 51 (*infra,* p. 8), and followed in the opinion the Circuit Court of Appeals below (R. 37) that an order for the examination of a witness, other than the bankrupt, should be for special cause shown, the sufficiency of which it is within the discretion of the Court to decide in each particular case.

POINT II.

The Circuit Court of Appeals properly held that the order of the District Court was within its discretion.

Many decisions, including all of the cases cited by petitioner, sustain the unquestioned rule that the grant or refusal of an order for examination under Section 21a rests in the sound discretion of the Court, and that such discretion will not be set aside except for abuse. [In re *Abbey Press,* 134 Fed. 51, cert. den. 196 U. S. 642, *In re Nesbitt, Limited,* 282 Fed. 265 *and R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.* 54 Fed. (2nd) 329].

There is no quarrel between the parties as to the rule. The trustee, however, seeks to limit its application to the action of District Court in granting the *ex parte* order. In Point II of his brief (p. 16) petitioner argues as if all of the matters which were before the District Court on the motion to vacate, and which appear in the record before this Court, had been presented and considered on the *ex parte* application. By this relation back theory the trustee attempts to remove all consideration of discretion in the District Court to refuse the examination and seeks to transfer to the Superintendent the burden of proving an abuse of discretion.

It is captious to contend that the perfunctory granting of the *ex parte* order for the examination of the Superintendent, on the basis of the unopposed and unexplained allegations in the trustee's petition, involved an exercise of discretion which could be set aside only for abuse. In the actual and accepted practice of the judges of the Southern District of New York, a motion to vacate such *ex parte* order is regularly heard by the judge holding motion term and is not referred to the judge who made the order. Such

motion is treated, in effect, as the equivalent of a litigated application on notice for the examination. The motion term judge does not presume to review an exercise of discretion by the judge who signed the *ex parte* order nor does the latter consider the hearing of the motion by the former in any such light. In this respect the Circuit Court of Appeals stated (R. 37, 38):

> "The claim that the original *ex parte* order could itself be vacated only upon demonstration of an abuse of discretion has no substance here; district court procedure is obviously to treat the hearing on motion to vacate as the real trial on the merits, and the appeal brings the whole proceeding before us for review."

To the same effect see *In re A. & W. Nesbitt, Limited,* 282 Fed. 265; *In re Union Mort. Inv. Co.,* 25 Fed. Supt. 468.

The sole question here, accordingly, is whether the order of the District Court denying the examination was an abuse of discretion.

POINT III.

The trustee's application to examine the Superintendent having been based on a misconception of the effective date of Executive Order 8832, and no actual cause for such examination having been shown, the Circuit Court of Appeals properly held that the District Court did not abuse its discretion in vacating the *ex parte* order and denying the examination.

In the case of *In re Abbey Press,* 134 Fed. 51, cert. den. 196 U. S. 642, the Circuit Court of Appeals of the Second Circuit declared the rule governing the grant or refusal of an order for the examination of a third party under Section 21a of the Bankruptcy Act as follows:

> "Any order for the examination of any witness other than a bankrupt, whether on first or second examination, should be for a special cause shown; but the authorities cited show that it has been uniformly held that it is within the discretion of the referee to decide in each particular case what cause is sufficient, and upon what information he will make the order. It must be held, therefore, that the grant or refusal of the order is a matter intrusted by law to the discretion of the court; the referee being in the present instance the court" (p. 56).

The attempts of the trustee to show special cause for the examination of the Superintendent revolve around a payment of $150,000 to the New York Agency of The Yokohama Specie Bank, Ltd. made by the Bankrupt on July 17, 1941.

The trustee first claimed, in his petition on the *ex parte* application to examine the Superintendent, that "sums of money (had been) illegally deposited in The Yokohama Specie Bank, Ltd. at its branch in New York City, during the year 1941" (R. 4). The claims filed with the Superintendent, and the complaint in the action brought by the trustee, show that the illegality claimed was an alleged violation of the proclamation of the President of the United States prohibiting certain transactions with any national of the Empire of Japan (R. 16). The Superintendent invoked judicial notice that Executive Order 8832, the first "Freezing Order" affecting Japan, was signed and published by the President on July 26, 1941, nine days after the "deposit" on July 17, 1941. It is clear, therefore, that the special cause sought to be shown for the *ex parte* order was based on the belief of the trustee that a law had been violated which was not in existence at the time of the transaction. The trustee has abandoned any contention that the $150,000 transaction involved a violation of Executive Order 8832

and does not now rest his showing for examination upon the ground of "illegal deposits" advanced in his petition.

In the affidavit submitted in opposition to the motion to vacate the trustee advances a further theory for the necessity or propriety of examining the Superintendent. He outlines an alleged "scheme" between the bankrupt and The Yokohama Specie Bank, Ltd. under which money was "deposited" in an agency in this country "so as to make it appear that the Bankrupt's funds were transferred to Japan while actually the moneys deposited by the Bankrupt in The Yokohama Specie Bank, Ltd. were always available to the Bankrupt and were never transferred to Japan" (R. 24). The "scheme" is described in detail (R. 24-26) and upon it the trustee now depends for a showing of special cause for the examination.

The trustee himself exposes the alleged scheme as a figment of the imagination. In his enumeration of the steps followed in the execution of the alleged plot not to transmit funds to Japan the trustee proves affirmatively and conclusively, as a matter of law and of judicial notice, that there was an effective and bona fide transmittal. No preliminary consideration of the merits of the claim is required. The sole question is whether it is an abuse of discretion for the court to refuse an examination of a third party where the special cause asserted is a contradiction in terms.

The matters stated in the affidavit to have been discovered by the trustee (R. 24-26) and urged as reasonable cause to believe the existence of the "scheme" are matters of every day international banking business. The example of the transactions by the bankrupt with the California Agency is offered by the trustee. Money was delivered to The Yokohama Specie Bank (California Branch) which issued a certificate of temporary deposit and then cabled the receipt of this deposit to its head office in Tokyo and

at the same time the California Agency placed in its Account Book entitled "Foreign Exchange" the item of the receipt in terms of Yen; the Bank in Tokyo confirmed the receipt of the cable, sometimes by cable and at all times by "advice of transfer"; the original certificate was kept in custody in Tokyo (R. 25). The books of the California branch would show a clearance to Tokyo each day and a reduction in the balance due Tokyo from California (R. 25).

Up to this point no one would contend that anything took place except the everyday procedure of transmitting funds by cable from the United States to Japan. The trustee certainly does not wish to be understood as contending that a telegraphic transfer of funds is not effective. He surely does not mean that currency must be mailed or physically transported.

The trustee assumes, however, to show unmistakable evidence of the "scheme" when he proceeds to discuss how the funds were made "available" to the bankrupt in the United States (R. 25). "The bankrupt would deliver a letter asking for a certain sum of money and a temporary certificate of deposit which it had in its possession. The records of The Yokohama Specie Bank would show that they did telegraph to Tokyo presumably to have this amount of money returned upon a certain date. The Yokohama Specie Bank at Tokyo would then send a telegraphic cable presumably wiring the money which again would result in debit and credit entries on both sides of the books of The Yokohama Specie Bank both in California and in Tokyo. The moneys that were returned to California were always in dollars and not in Yen and not at the rate of exchange on the date on which they were alleged to have been returned although the rate of exchange would vary each day and the moneys alleged to have been returned were always the exact sum of dollars deposited" (R. 25-26).

The trustee further argues that the fact that the New York Agency of The Yokohama Specie Bank, Ltd. issued its check to the bankrupt in the sum of $40,000 on July 25, 1941, and that the Superintendent of Banks has listed said $40,000 as an account payable to the holder of the check and allowed it as a valid debt against the New York Agency (R. 27), is proof that the $150,000 "deposited" by the bankrupt on July 17, 1941, was not transferred to Japan.

The fact that funds transmitted to Japan were subsequently made "available" in dollars to the bankrupt in the United States proves nothing, of course, against the actuality of transfer; but, beyond that, the method of making the funds "available" described by the trustee is so unequivocally referable to an actual transmittal as to be meaningless without it. It not only fails to support suspicion of the alleged scheme, it dispels the illusion under which the claim is made.

The Courts take judicial notice of matters of common knowledge in banking practice. (*National Surety Co.* v. *McCormick,* 268 Fed. 185; *Stockyards Nat. Bank of St. Paul, Minn.* v. *First Nat. Bank of Towner,* N. D., 249 Fed. 421; *Republic Supply Co. of Cal.* v. *Richfield Oil Co. of Cal.,* 79 Fed. (2nd) 375; *Harriman Nat. Bank* v. *Commissioner of Internal Revenue,* 43 Fed. (2nd) 950; *Ali* v. *Haff,* 114 Fed. (2nd) 369; *U. S.* v. *National City Bank of New York,* 40 F. Supp. 99). The court below, accordingly, could properly take judicial notice that the steps outlined by the trustee as basis for a belief in the existence of the alleged "scheme" are nothing but the everyday methods followed in international banking transactions and actually refute the claim of a scheme.

The attempts of the trustee to show special cause for an examination of the Superintendent are without substance.

They do not meet the requirement set forth in *In re Abbey Press, supra.* No reason has been advanced which would indicate that the examination would tend to serve the purposes of Section 21a.

The discretion of the Court is as broad to refuse as to grant an examination. It cannot be an abuse of discretion to follow the rule that special cause should be shown for the examination of a third party, and to refuse the examination when the expressly stated reason for it is to support claims which are disclosed by the trustee's statement of them to be based upon misconception of law and common banking practice, and are further shown to be incapable of support through the examination sought.

It is respectfully submitted that the refusal of an order for the examination of the Superintendent of Banks of the State of New York in the circumstances disclosed by the record was the exercise of a sound judicial discretion and that the decision of the Circuit Court of Appeals was therefore correct.

Conclusion.

For the foregoing reasons it is respectfully submitted that the application for the writ should be denied.

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